

When persons sell tangible personal property which they are not otherwise engaged in the business of selling, such transactions may be occasional sales not subject to ROT. See 86 Ill. Adm. Code 130.110. (This is a GIL.)

August 21, 2000

Dear Xxxxx:

This letter is in response to your letter dated June 6, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be accessed at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

We are requesting a letter ruling seeking confirmation that the following transaction, entered into by my client, COMPANY A (hereinafter 'Company A'), will not be subject to Illinois Retailer's Occupation Tax or Use Tax.

Statement of Facts

Company A owns two aircraft, a Hawker and a Challenger, and intended to purchase a second Challenger. Company A is not a retailer and is not in the business of selling aircraft at retail. The aircraft are used to transport Company A's employees as an incident to its general business operations.

On March 10, 1999, Company A entered into an agreement with RETAILER B ('Retailer B') to purchase a 'green' Challenger aircraft. The agreement stated that Company A would take title and delivery of the aircraft in COUNTRY, upon its completion, expected to be on or before February 15, 2000. The agreement also contained a provision that would allow Company A to trade in its Hawker aircraft.

On September 9, 1999, Company A entered into an agreement with NAME to complete the interior of the Challenger. The outfitting would take place in CITY/STATE and be completed by the end of July 2000.

Company A is interested in receiving like-kind exchange treatment on its transaction involving the Hawker and the new Challenger for federal income tax purposes under Section 1031 of the Internal Revenue Code. Section 1031 of the Internal Revenue Code allows companies to perform a like-kind exchange transaction of property such as an aircraft resulting in a deferral of taxable income on the exchanged aircraft. If Company A did not enter into a like-kind exchange transaction, Company A would have

taxable income on the sale of the Hawker. Company A also wanted to maximize the selling price of the Hawker, and thought that this would not occur if it accepted Retailer B's trade-in price.

To receive the best price for the Hawker and to ensure that Company A would qualify for Section 1031 like-kind exchange treatment, Company A entered into an agreement with COMPANY C ('Company C') in December 1999. Company C set up a Single Purpose Corporation, COMPANY D ('Company D'), to which Company A, on January 27, 2000, assigned the purchase rights for the new Challenger in exchange for a promissory note and the option to buy the finished Challenger. On February 3, 2000, Company D took title to the new Challenger. Upon completion of the interior of the new aircraft, Company A will exchange the Hawker with Company D (Company A will have previously found a buyer to purchase the old airplane, and will assign its contractual right to sell to Company D) in exchange for the new Challenger and the balance of the note.

Company A plans to exercise its option to purchase the Challenger from Company D on or about July 31, 2000. Company A will take possession of the aircraft in the State of Arizona. (The Challenger will not be operated in or over Illinois by Company A after the title of the new Challenger has transferred to Company A.)

Company A has now determined that it should set up a Limited Liability Company ('Subsidiary E') that will be a wholly owned aviation subsidiary of Company A. Shortly after Subsidiary E is established, Company A will transfer both Challengers to Subsidiary E. The new Challenger will then be brought into Illinois and hangared at the ##### airport in CITY, Illinois. Subsidiary E will be a flight services and operations company, operating the two Challengers under the authority of Section 91.501, Subpart F of the Federal Aviation Regulations. Subsidiary E will provide aviation services to the members of the Company A affiliated group. Subsidiary E will be established for business and liability purposes and for income tax purposes to consolidate the aviation resources into a single limited liability entity. The transfer of the aircraft to the Subsidiary E is in furtherance of this business objective.

Rulings Requested

1. Company A requests a ruling that its purchase of the Challenger from Company D in the STATE and its use of the aircraft outside of Illinois are not subject to the Illinois Use Tax. The aircraft has not and will not be operated in or over Illinois while Company A owns it. The aircraft is currently located in STATE.
2. Company A requests a ruling that its sale and delivery of the aircraft to the newly formed, wholly-owned Subsidiary E outside of Illinois not be subject to Illinois Retailer's Occupation Tax. The sale is an isolated or occasional sale by Company A and delivery of the property to Subsidiary E will not occur in Illinois.

3. Subsidiary E requests a ruling that its purchase of the aircraft from Company A will qualify as an isolated or occasional purchase in Illinois and that the aircraft will be exempt from the Illinois Use Tax and any otherwise applicable local use taxes when the aircraft is brought in or over Illinois, or operated in or over Illinois, and registered.

Authority

35 ILCS 105/2 and 35 ILCS 120/1 exempt: 'The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail...'

86 Illinois Administrative Code 130.110:

'(a) Since the Act does not impose a tax upon persons who are not engaged in the business of selling tangible personal property, persons who make isolated or occasional sales thereof do not incur tax liability.'

86 Illinois Administrative Code 150.101:

'(c) However, if the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by the Use Tax Act shall not apply to the use of such tangible personal property in this state.'

'(d) For example, a purchaser of tangible personal property from a seller who qualifies as an isolated or occasional seller so as not to incur Retailers' Occupation Tax liability is not liable for the Use Tax when using such property in Illinois.'

Trans-Air Corporation v. Department of Revenue, 86 Ill. App 3d 750 (1980).

Letter Rulings: 86-0592, 87-0737, 88-0039, 90-0093, 90-0662, 91-618, 91-0739, 94-0272, 95-0138, 95-0296, 97-0236, and 99-0018.

Contrary Authority

Company A and Subsidiary E are unaware of any Illinois authority contrary to the position that the transfer of the aircraft by Company A to Subsidiary E would qualify as an exempt occasional sale.

Argument

Since Company A is purchasing the aircraft outside of Illinois and will not be using the aircraft in Illinois or over Illinois while it owns it, Company A should not incur any Illinois Use Tax liability.

Company A also will not be subject to the Retailer's Occupation Tax on the sale of the aircraft to Subsidiary E. The sale of the aircraft by Company A will take place outside of Illinois and therefore not subject to Illinois Retailer's Occupation Tax.

Lastly, Subsidiary E should not be subject to Illinois Use Tax on the purchase of the Challenger, since the seller is not subject to the Retailers' Occupation Tax. Illinois Administrative Code, Section 150.101(c) states that 'if the seller of tangible personal property for use would not be subject under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by the Use Tax Act shall not apply to the use of such tangible personal property in this state.' If the sale by Company A of the aircraft had taken place in Illinois, it would not have been subject to tax. Company A is not a retailer in aircraft and is not in the business of selling aircraft; therefore Company A is exempt from the Retailer's Occupation Tax on this sale. The following Illinois laws 35 ILCS 105/2 and 35 ILCS 120/1 exempt: 'The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail...'

In Private Letter Ruling 99-0018, the Department noted that Regulation 130.110 makes reference to the notion that the occasional sale exemption is only available when 'a person purchases an item of tangible personal property with the intention of using the item and then, after using the item, disposes of it by selling it.' In determining that the aircraft was sold by means of an occasional sale, the Department analyzed this requirement as follows: 'We note in particular that you represent that when COMPANY purchased the plane from Gulfstream, it did so with the intent to use the plane itself and it did not purchase the plane with the intent to resell it to BUSINESS or anyone else.' Thus, the Department determined this sale was an exempt occasional sale, and focused on the intention to use the aircraft by the original purchaser, and did not focus on the actual use, which consisted of the aircraft sitting in Georgia while being outfitted.

When Company A decided to purchase the Challenger on March 10, 1999, it planned to use the aircraft to transport its employees as an incident to its general business operations. The original agreement called for Company A to obtain title to the Challenger on February 15, 2000. Company A then decided to enlist the aid of a third party to help qualify the sale of its old aircraft as a like kind exchange. In order to accomplish this, Company A assigned its purchase rights to the third party, so that the third party took title to the aircraft in February, rather than Company A. Company A received an option to purchase the completed Challenger, so that the aircraft could only be sold to Company A, or to the assignee of Company A.

Only later, while Company A was analyzing its business activities, did Company A determine that the Subsidiary E should be created for business and liability purposes, and income tax purposes. As originally contemplated, Company A would have taken title to the aircraft in February 2000, months before it decided to sell the aircraft to the Subsidiary E, and months before it could have sold the aircraft (assuming it would have sold a fully-outfitted aircraft). Due to the delay in time of title passing to Company A because of the like-kind exchange requirements, Company A will not hold legal title in the aircraft for a significant time period prior to the sale of the aircraft to the aviation subsidiary. Instead, Company C held title since February 3, 2000, with the expectation that it would transfer title to Company A, or its assignee, at the end of July 2000, just a short time before the sale to Subsidiary E.

In conclusion, the fact pattern in this letter ruling is substantially similar to the fact pattern in Private Letter Ruling 99-0018 such as to warrant the Department reaching the same conclusion. Company A's business purpose in creating Subsidiary E mirrors the business purpose of the Company in PLR 99-0018. Also, Company A and the Company in PLR 99-0018 had not contemplated the creation of an aviation subsidiary until after the aircraft had been ordered. In our situation, Company A has temporarily assigned its title interest in the aircraft to a third-party in order to qualify for IRS like-kind exchange treatment. Because of the like-kind exchange requirements, title will not transfer to Company A until after the aircraft has been fully outfitted. In both cases, upon completion of the outfitting, and acceptance of the aircraft, the parent company then transfers the aircraft to the aviation subsidiary, prior to its use in Illinois. This transaction by Company A should qualify as an occasional sale, focusing on the original intent of Company A to use the aircraft when it entered into the contract for purchase on March 10, 1999.

We respectfully request confirmation of these conclusions in a letter ruling. The undersigned are not aware of any authorities contrary to these conclusions. While Letter Ruling 99-0018 appears to address the relevant issue, supporting the exempt nature of the transaction, the facts are slightly different as to not impart reliance upon that ruling by Company A and Subsidiary E.

Neither an audit nor litigation related to these matters is pending with the Illinois Department of Revenue. We have enclosed an executed Power of Attorney authorizing the undersigned to represent Company A on this matter. If a disposition other than a favorable ruling is contemplated, a conference is requested.

Please contact me at ##### if you have any questions regarding this matter.

We are unable to issue a private letter ruling on the issue of whether your client's purchase of the Challenger and subsequent sale to E is an occasional sale exempt from Illinois Retailers' Occupation Tax and Use Tax. The ruling you request is so fact intensive and dependent upon assertions of intent that we respectfully decline to make a determination. We believe that a

Department tax auditor would be the appropriate person to review all relevant information and documents in order to consider your allegations of fact. This will occur if one attempts to register the airplane in Illinois without paying tax.

Your letter sets out several events regarding the purchase of a Challenger aircraft by COMPANY A and its proposed subsequent use of the plane in Illinois. Your letter contains many allegations of fact and intent. As noted above, because the ruling you request is so fact specific and dependent upon assertions of intent we must decline to make a conclusive ruling. We are, however, providing general information for your consideration.

As a general proposition, the occasional sale exemption is available when a person purchases an item and then, after using the item, disposes of it by selling it. Please refer to 86 Ill. Adm. Code 130.110. When a person purchases an item of tangible personal property with the intention of reselling it to a purchaser for use or consumption, that person engages in conduct equivalent to holding himself out as a retailer. This makes the initial purchase a purchase for resale and the subsequent sale is a taxable sale at retail subject to Illinois Retailers' Occupation and Use Tax liabilities. See 86 Ill. Adm. Code 130.201 and 130.210. An infrequent number of such sales does not transform them into occasional sales because the original objective of purchasing the item for resale to a purchaser for use or consumption establishes that the purpose of the sales transactions are resale (initial transaction) and retail (subsequent transaction).

In the event you can demonstrate that when COMPANY A purchased the plane, it did so with the intent to use the plane itself and it did not purchase the plane with the intent to resell it to E or anyone else, the occasional sale exemption would be available. If that was not the case, the occasional sale exemption would not be available and E will incur Illinois and local Use Tax liabilities when it brings the plane to Illinois. Further, if COMPANY A were to purchase another aircraft and resell it to E, COMPANY A will be functioning as a retailer and that sale would be subject to Retailers' Occupation and Use Tax liabilities.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Karl W. Betz
Associate Counsel

KWB:msk
Enc.